

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF LABOR AND INDUSTRY

In the Matter of Brian Malamisuro,
individually and d/b/a Fortuna Builders

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

The above-entitled matter came on for a prehearing conference before Administrative Law Judge Kathleen D. Sheehy on June 21, 2005, at 1:30 p.m. at the Office of Administrative Hearings in Minneapolis, Minnesota.^[1] Christopher M. Kaisershot, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, Minnesota 55101-2130, appeared on behalf of the Department of Labor and Industry (the Department). There was no appearance by or on behalf of the Respondent, Brian Malamisuro, d/b/a Fortuna Builders, 10141 Quince Street NW, Coon Rapids, MN 55433. The OAH record closed at the conclusion of the prehearing conference.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Labor and Industry will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Nancy Leppink, Director of Legal Services, Minnesota Department of Labor and Industry, 443 Lafayette Road, St. Paul, MN 55155, to ascertain the procedure for filing exceptions or presenting argument to the Commissioner.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUES

The issues presented in this case are whether Respondent's residential building contractor's license should be subject to discipline and whether civil penalties should be assessed because:

(1) the Respondent failed to respond to the Department's requests for information and order to appear, in violation of Minn. Stat. §§ 45.027, subds. 1a, 2, 7(a)(2), and 326.91, subd. 1(5);

(2) the Respondent failed to obtain building permits and inspections for work performed on two remodeling projects, demonstrating that he has been incompetent, untrustworthy, or financially irresponsible in violation of Minn. Stat. §§ 45.027, subd. 7(a)(4), 326.91, subd. 1(2), and Minn. R. 2891.0040, subp. 1H;

(3) the Respondent failed to complete two remodeling projects and performed negligently or in breach of contract, in violation of Minn. Stat. §§ 45.027, subd. 7(a)(2), and 326.91, subd. 1(4);

(4) the Respondent failed to satisfy a judgment, demonstrating that he has been incompetent, untrustworthy, and financially irresponsible in violation of Minn. Stat. §§ 45.027, subd. 7(a)(4), and 326.91, subd. 1(6);

(5) the Respondent failed to pay a lumber yard for materials supplied for three remodeling projects, demonstrating that Respondent has been incompetent, untrustworthy, and financially irresponsible, in violation of Minn. Stat. §§ 45.027, subd. 7(a)(4), and 326.91, subd. 1(6);

(6) the Respondent issued a check to a lumber yard that was returned for insufficient funds, demonstrating that Respondent has been incompetent, untrustworthy, and financially irresponsible, in violation of Minn. Stat. §§ 45.027, subd. 7(a)(4), and 326.91, subd. 1(6); and

(7) the Respondent failed to use the proceeds of payments made by a client to pay for materials used in their remodeling project, in violation of Minn. Stat. §§ 45.027, subd. 7(a)(2), and 326.91, subd. 1(8).

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On May 12, 2005, the Commissioner of Commerce issued a Notice of and Order for Hearing, Order for Prehearing Conference, Order to Show Cause and Statement of Charges (Notice and Order for Hearing). On May 17, 2005, the Department of Commerce served the Notice and Order for Hearing on the Respondent by first-class mail addressed to Brian Malamisuro, Fortuna Builders, 10141 Quince Street NW, Coon Rapids, MN 55433. On May 26, 2005, the Department of Commerce served another copy of the Notice and Order for Hearing on the Respondent by first-

class mail addressed to Brian Malamisuro, Fortuna Builders, 13871 Marven Drive, Irwin, PA 15642. This address was provided by one of Respondent's former clients. Neither mailing was returned by the post office.

2. The Prehearing Conference was scheduled to take place at 1:30 p.m. on June 21, 2005, at the Office of Administrative Hearings.

3. The Notice and Order for Hearing contained the following language:

Respondent's failure to appear at the prehearing conference may result in a finding that Respondent is in default, that the Department's allegations contained in the Statement of Charges may be accepted as true, and that its proposed disciplinary action may be upheld.^[2]

4. The Respondent failed to appear for the prehearing conference on June 21, 2005. He did not contact the Department or the Administrative Law Judge to request a continuance. Because the Respondent failed to appear at the prehearing conference in this matter, he is in default.

8. Pursuant to Minn. Rules part 1400.6000, the allegations contained in the Notice of and Order for Hearing at paragraphs 1 through 19 are hereby taken as true and incorporated into these Findings of Fact.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Commerce have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50, 45.027, and 326.91.

2. The Notice and Order for Hearing issued by the Department was proper and the Department has fulfilled all relevant procedural requirements of law and rule.

3. The Respondent is in default. Pursuant to Minn. Rules part 1400.6000, the allegations contained in the Notice of and Order for Hearing are hereby taken as true.

4. By failing to respond to the Department's requests for information and order to appear, the Respondent has violated Minn. Stat. §§ 45.027, subds. 1a and 7(a)(2).

5. By failing to obtain building permits and inspections for work performed on two remodeling projects, the Respondent demonstrated that he has been incompetent, untrustworthy, or financially irresponsible, in violation of Minn. Stat. §§ 45.027, subd. 7(a)(4), 326.91, subd. 1(2), and Minn. R. 2891.0040, subp. 1H.

6. By failing to complete two remodeling projects, the Respondent has performed negligently or in breach of contract, in violation of Minn. Stat. §§ 45.027, subd. 7(a)(2), and 326.91, subd. 1(4).

7. By failing to satisfy a judgment obtained by a former client, Respondent has demonstrated that he has been incompetent, untrustworthy, and financially irresponsible, in violation of Minn. Stat. §§ 45.027, subd. 7(a)(4), and 326.91, subd. 1(6).

8. By failing to pay a lumber yard for materials supplied for three remodeling projects, Respondent has demonstrated that he has been incompetent, untrustworthy, and financially irresponsible, in violation of Minn. Stat. §§ 45.027, subd. 7(a)(4), and 326.91, subd. 1(6).

9. By issuing a check to a lumber yard that was returned for insufficient funds, Respondent has demonstrated that he has been incompetent, untrustworthy, and financially irresponsible, in violation of Minn. Stat. §§ 45.027, subd. 7(a)(4), and 326.91, subd. 1(6).

10. By failing to use the proceeds of payments made by a client to pay for construction materials for their remodeling project, the Respondent violated Minn. Stat. § 45.027, subd. 7(a)(2), 326.91, subd. 1(8).

11. The imposition of discipline and/or civil penalties against the Respondent is in the public interest.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Labor and Industry take disciplinary action and/or impose appropriate civil penalties against the Respondent.

Dated: July 6, 2005

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

Reported: Default.

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail or as otherwise provided by law.

^[1] This action was commenced by the Department of Commerce. On May 16, 2005, the Governor signed Executive Order 193, transferring the responsibility for regulation of residential building contractors to the Department of Labor and Industry. The caption has been amended accordingly.

^[2] Notice and Order for Hearing at 6.